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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF NEW MEXICO AND HAROLD F. OLSON, Individually and as Director, New Mexico Department of Game and Fish,

Petitioners,

v.

MESCALARO APACHE TRIBE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF AMICUS CURIAE SOUTHERN UTE INDIAN TRIBE IN SUPPORT OF RESPONDENT

P. O. Box 2717
Durango, CO 81301
(303) 247-1755

FRANK E. (SAM) MAYNES
MAYNES, BRADFORD & SHIPPS
Counsel for Southern Ute Indian Tribe of the Southern Ute Indian Reservation

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INTEREST OF AMICUS

This Brief is submitted with the written consent of the parties to this case, lodged with the Clerk.

Amicus Southern Ute Indian Tribe has enacted regulations for the control and management of wildlife located on

the Southern Ute Indian Reservation, including licensing provisions applied to non-Indians who wish to hunt or fish on reservation land. The Southern Ute Indian Tribe claims the right to regulate such activities to the exclusion of any such regulation by the state of Colorado. The Southern Ute Indian Tribe therefore supports the position of the Mescalaro Apache Tribe herein.

SUMMARY OF ARGUMENT

The interest asserted by the state of New Mexico in the enforcement of its fish and game licensing laws against non-Indians hunting or fishing on the Mescalaro Apache Reservation is too attenuated to justify the associated disruption of tribal wildlife management programs. The traditional tribal interest in hunting and fishing rights is well recognized, and significant tribal interest in the regulation

of hunting and fishing activities of non-Indians on the Mescalaro Apache Reservation is supported by correlated tribal interests in unimpeded self-government and tribal self-sufficiency which surmount any alleged interest of the state in wildlife management within Indian country. The Mescalaro Apache Tribe's right of self-government reasonably includes the right to stimulate economic development through management of those resources which are historically inseparable from the traditional Indian way of life. Analysis of state and tribal interests in light of the preemption and self-government tests firmly supports the finding of the Tenth Circuit: The state of New Mexico may not enforce its fish and game licensing provisions against non-Indians fishing or hunting on the Mescalaro Apache Reservation.

ARGUMENT

I. ENFORCEMENT OF THE FISH AND GAME REGULATIONS OF THE STATE OF NEW MEXICO AGAINST NON-INDIANS HUNTING OR FISHING WITHIN THE EXTERIOR BOUNDARIES OF THE MESCALARO APACHE INDIAN RESERVATION IS ADVERSE TO TRIBAL INTERESTS.

The Mescalaro Apache Tribe has developed a comprehensive wildlife management program. The Tribe employs seven full time tribal conservation officers who work with the Bureau of Indian Affairs conservationist to recommend bag limits and seasons to the tribal council. The tribal conservation officers implement extensive fish and game management programs. With the assistance and advice of the federal government, the Tribe is responsible for stocking the reservation waters with fish; and, in fact, man-made lakes have been built and stocked by the Tribe. See Respondent's Appendix at 7a-8a. Further, the Tribe's achievements with the elk herd located on the reservation are

impressive. At one time that elk herd numbered about thirteen. One hundred sixty-two elk were provided by the National Park Service and released on the reservation, and through the management of the Mescalaro Apache Tribe, including programs designed to reduce the wild horse population which competes with the elk for forage, the elk herd located on the reservation has increased to a population of approximately 1200. Id. at 8a-9a.

The effort of the Mescalaro Apache Tribe has been directed toward maximizing tribal resources. The Tribe has an active tourism program designed to attract non-Indians to the reservation, thereby providing income to be used for governmental purposes and the economic development of the Mescalaro Apache Tribe. The Tribe's tourism program was developed in anticipation of declining

income from lumbering enterprises. Id. at 5a-6a. In connection with this tourism program, the Tribe sponsors hunting, fishing, camping, and picnicking programs. Package hunts of big game animals are also available, and are intended to stimulate business at the Inn of the Mountain Gods, a tribal enterprise located on the Reservation and largely financed by the federal government. Id. at 4a-5a. The Tribe requires non-Indian sportsmen wishing to hunt or fish on the reservation to purchase tribal licenses. Id. at 7a.

The Tribal Council, in making planning decisions, considers, and is entitled to consider, the interplay between hunting and fishing and tourism. One purpose of the package hunts is to promote business at the Inn of the Mountain Gods between the summer tourism season and the winter ski season. Id. at 6a. The

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Tribe legitimately considers the economic interrelationship of tourism and outdoor sporting activities when setting seasons for fishing and hunting, and thereby properly acts both to meet the economic needs of the Tribe and to manage effectively wildlife inhabiting the reservation. Similarly, the Tribal Council has properly exercised its judgment in passing tribal regulations which allow a hunter to purchase elk or antelope licenses in two consecutive years. The state does not allow such licensing. Id. at 15a. The Council carefully considers wildlife management goals and economic needs of the Tribe with which the state need not concern itself.

The Mescalaro Apache Tribe has a distinct and recognized interest in governing the territory with which it has been entrusted.

> The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980). This "significant territorial component to tribal power" was again recognized by this Court in Merrion v. Jicarilla Apache Tribe, __U.S.__, 71 L.Ed.2d 21, 32 (1982). Further, a noted authority in the field of Indian law has stated:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather "inherent powers of a limited sovereignty which has never been extinguished."

F. Cohen, Handbook of Federal Indian Law, p.231, (1982 Ed.) (footnotes omitted).

The importance of fish and game to Indians inhabiting reservations has been established by this Court. See Menominee Tribe v. U.S., 391 U.S. 404 (1968); United States v. Winans, 198 U.S. 371 (1905). The traditional tribal interest in hunting and fishing rights is well recognized, and a significant tribal interest in the regulation of non-Indian hunting and fishing on reservation lands is supported by correlated interests in unimpeded self-government and tribal self-sufficiency. The Mescalaro Apache Tribe has reasonably acted to stimulate economic development through management of an historically protected tribal resource.

This Court stated in White Mountain Apache Tribe v. Bracker:

> The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. As we have repeatedly recognized, this

> tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development. Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence.

448 U.S. at 143-144, (citations omitted). Specific examples of this congressional policy were pointed out:

> For example, the Indian Financing Act of 1974 states: "It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

Id. n. 10 (citations omitted). Similar policies underlie the Indian Self-Determination and Assistance Act of 1975 as well as the Indian Reorganization Act of 1934. Id. The tribal interest in an undisturbed administration of wildlife

management programs and the exclusive enforcement of tribal fish and game regulations on the Mescalaro Apache Reservation was properly recognized by the Tenth Circuit as paramount to the interests asserted by the state of New Mexico in the instant case.

II. EXCLUSIVE TRIBAL REGULATION OF FISH AND GAME WITHIN THE EXTERIOR BOUNDARIES OF THE MESCALARO APACHE RESERVATION HAS NO ADVERSE IMPACT ON ANY INTEREST LEGITIMATELY ASSERTED BY THE STATE OF NEW MEXICO.

The state is concerned with facilitating enforcement of state wildlife regulations. This interest is not disturbed by independent tribal regulation, however. New Mexico Department of Game and Fish officers routinely stop hunters to determine whether the game in their possession was legally taken. Respondent's Appendix at 17a. Game tags are issued with each tribal license and must be attached to game taken on the

Mescalaro Apache Reservation. Id. at 7a. In the event that an individual is stopped and game in his possession carries a Mescalaro Apache Reservation tag, no further action need be taken. This presents no greater enforcement problem to state officials than does an out-of-state hunter transporting game taken and tagged out-of-state through the state of New Mexico.

The state alleges, however, that an enforcement gap exists because the Tribe cannot exert criminal jurisdiction over non-Indians committing criminal offenses on the Mescalaro Apache Reservation. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). It first must be pointed out that any difficulty the Tribe might experience in enforcement of tribal fish and game regulations is not a problem with which the state need concern itself, so long as there is no

adverse impact on wildlife outside the reservation, see Respondent's Appendix at 20a. Further, it is clear that the Tribe has the power to exclude non-Indians from the reservation, Merrion, 71 L.Ed.2d at 32; Eastern Band of Cherokee Indians v. N.C. Wildlife, 588 F.2d 75 (4th Cir. 1978); White Earth Band of Chippewa Indians v. Alexander, 518 F.Supp. 527, 534 (D.Minn. 1981); People v. Quechan Tribe of Indians, 424 F.Supp. 969, 972 (S.D. Calif. 1977) vac. on other grounds 595 F.2d 1153; and in addition, 18 U.S.C. §1165 provides for federal prosecution of non-Indians who enter Indian land with the intent to hunt or fish illegally. Finally, the Oliphant decision does not preclude the Tribe from assessing civil penalties against violators as a condition attached to the issuance of tribal permits. See Oliphant, 435 U.S. at 196, n. 7. The

alleged enforcement gap is illusory.

The state asserts an interest in federal funds allocated to the state of New Mexico based on the number of state hunting and fishing licenses sold[1] and the number of acres of land in the state. The Mescalaro Apache Reservation is taken into account for purposes of determining acreage. Respondent's Appendix at 10a. No such funds have been spent directly on the Mescalaro Apache Reservation within recent years, however, id.; and in any case a state interest in the continued availability of federal funds, where those funds are claimed based on an illegal assertion of jurisdiction, fails to legitimate that assertion of jurisdiction.

Petitioners direct the Court's

[1] In recent years state licenses have been required on the Mescalaro Apache Reservation under the protest of the Mescalaro Apache Tribe. See Respondent's Appendix at 10a.

attention to the interest of the state in wildlife conservation. Brief of Petitioners at 21. The state has stipulated, however, that "the Department (of Game and Fish) considers that the hunting and fishing ordinances of the Tribe presently maintain the fish and wildlife populations within the reservation at levels consistent with good management and have not had an adverse impact on wildlife outside the reservation." Respondent's Appendix at 20a.

Similarly, the state's asserted interest in a general right to manage and control wildlife is misplaced. The Petitioners cite Baldwin v. Montana Fish and Game Commission, 436 U.S. 371 (1978), for the proposition that the state is entitled to control fish and game within its boundaries. However, Baldwin is a privileges and immunities case standing for the proposition that nonresidents

are not entitled to hunt within the state of Montana for the same license fee as a state resident. The term "state" is used coextensively with the term sovereign, but the word "tribe" could as easily be substituted therefor. The Tenth Circuit properly recognized that such

> language does not describe the ecologically optimum vehicle for regulation of wildlife. Nor does it require that only one sovereign, the State, participate in wildlife management. Instead, it is descriptive of the trusteeship duty imposed on all sovereigns. The Tribe as a sovereign has undertaken that duty, as the State concedes, in an exemplary fashion, vastly improving the wildlife habitat on the reservation.

Mescalaro Apache Tribe v. New Mexico, 630 F.2d 724, 734 (10th Cir. 1980).

Dual regulatory systems create mutual dislocations. This Court has approved state imposition of certain taxes on non-Indians doing business on Indian reservations. Washington v. Confederated

Tribes of the Colville Reservation, 447 U.S. 134, 158, 159 (1980). Incompatible regulatory systems, however, pose different problems than those presented in the non-preemptive tax cases. Id. Further, in certain instances state taxes have been held impermissible under the infringement and preemption analyses. Bracker, 448 U.S. 136; Mescalaro Apache Tribe v. Jones, 411 U.S. 145, 158, 159 (1973); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965). Under the analysis required by White Mountain Apache Tribe v. Bracker, the assertion of state regulatory jurisdiction before this Court is prohibited.

III. THE JURISDICTIONAL ANALYSIS SET FORTH IN WHITE MOUNTAIN APACHE TRIBE V. BRACKER IS CONTROLLING AND WHEN APPLIED TO THE FACTS OF THE INSTANT CASE CLEARLY PROHIBITS STATE ENFORCEMENT OF STATE FISH AND GAME LAWS ON THE MESCALARO APACHE RESERVATION.

In holding state motor carrier license provisions and use fuel taxes inapplicable to a non-Indian enterprise operating solely on the Fort Apache Reservation, the Court applied two interrelated tests. First, the exercise of state authority may be preempted by federal law. Second, the application of state regulations on the reservation may infringe on the legitimate operation of tribal government. Bracker, 448 U.S. at 142. In Bracker, the Court called for a "particularized inquiry" into the facts of each case in making the preemption and infringement determinations. Id. at 144-145.

It is noteworthy that White Mountain Apache Tribe v. Bracker involved the attempted assertion of state regulatory jurisdiction against non-Indians conducting their activities exclusively within the boundaries of an Indian reservation where

those non-Indian activities were regulated by the Tribe as part of comprehensive resource management programs intended to promote the economic self-sufficiency of the Tribe and raise revenue for application to tribal governmental purposes.

A. TREATY PROVISIONS, FEDERAL LEGISLATION, AND A COMPREHENSIVE TRIBAL REGULATORY SCHEME COUPLED WITH EXTENSIVE FEDERAL INVOLVEMENT PREEMPT THE AUTHORITY OF THE STATE OF NEW MEXICO TO IMPOSE ITS FISH AND GAME LAWS ON NON-INDIANS HUNTING OR FISHING ON THE MESCALARO APACHE RESERVATION.

The Tenth Circuit's preemption analysis appropriately recognized six specific bases for a finding of federal preemption.

> In this case, the treaty and statutory basis for federal preemption is strong. We see as sources of preemption (1) the treaty; (2) the Enabling Act for New Mexico; (3) the Indian Reorganization Act of 1934; (4) the tribal constitution and ordinances enacted pursuant to the IRA; (5) the extensive federal developmental assistance; and (6) the negative inferences from Public Law 280.

Mescalaro Apache Tribe, 630 F.2d at 731. The Court continues "(t)hese factors,

considered in light of the tribe's inherent powers over reservation land and wildlife, compel our conclusion of preemption." Id.

The Tenth Circuit did not place undue emphasis on the "inherent powers" of the Tribe to manage reservation wildlife. McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) requires consideration of tribal sovereignty as a "backdrop" to the preemption analysis. A backdrop issue is not insignificant, as implied by the state; rather it necessarily pervades and colors the foreground. This Court, in White Mountain Apache Tribe v. Bracker stated:

> The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop", against which vague or ambiguous federal enactments must always be measured.

448 U.S. at 143 (citations omitted).

Extensive tribal regulation of hunting and fishing on the Mescalaro Apache Reservation and the comprehensive wildlife management program run by the Mescalaro Apache Tribe, coupled with significant federal developmental assistance, is highly pertinent to a finding of preemption. See Bracker, 448 U.S. 136. The Fourth Circuit in Eastern Band of Cherokee Indians, 588 F.2d 75, found the federal government's developmental assistance "bolsters the Band's economic well being, and is consistent with the United States' trust obligation toward Indian tribes." 588 F.2d at 78. The court concluded "that the strong federal policy supporting the Band's fishing program and the significant federal efforts sustaining it demonstrate an intention to preclude state regulation of non-member fishing on the Band's

reservation." Id. The same conclusion is appropriate in the instant case.

B. APPLICATION OF THE FISH AND GAME LAWS OF THE STATE OF NEW MEXICO TO NON-INDIANS HUNTING OR FISHING ON THE MESCALARO APACHE RESERVATION INFRINGES DRAMATICALLY AND IMPERMISSIBLY ON THE RIGHT OF THE MESCALARO APACHE TRIBE TO REGULATE TRIBAL RESOURCES LOCATED IN INDIAN COUNTRY.

The federal government has established the mechanism by which states may obtain jurisdiction over most crimes and civil causes of action which occur in Indian country. In 1953, Congress enacted Public Law 280 which offered states not specifically enumerated the option of accepting jurisdiction over Indian country. Act of August 15, 1953, 67 Stat. 588, (codified as amended, at 18 U.S.C. §1162, 25 U.S.C. §1321-1326, 28 U.S.C. §1360). New Mexico was not granted any specific authority pursuant to Public Law 280. Petitioner concedes that the state of New Mexico chose not to assume such jurisdiction.

See Brief of Petitioners at 29-30.

In order to resolve any ambiguities in the definition of Indian country, Congress in 1948 enacted 18 U.S.C. §1151. The United States Supreme Court has found that the terms of §1151 not only govern the limits of federal criminal jurisdiction, but also that the statute "generally applies as well to questions of civil jurisdiction". DeCoteau v. District County Court, 420 U.S. 425, 427, n. 2 (1975).

The breadth of the concept of Indian Country is manifested by the congressional determination that Indian country is not restricted to those lands owned by the United States for the benefit of the tribes. The proposition that the federal government's protection of tribal autonomy extends to non-Indian fee lands located within the boundaries of Indian reservations is most dramatically demonstrated in

the case of United States v. Mazurie, 419 U.S. 544 (1975). In Mazurie, even in the context of the limited definition of Indian country for purposes of liquor enforcement, this Court upheld tribal liquor regulations affecting non-Indian fee lands and upheld application of the tribal regulations to the non-Indian defendants as well.

This Court has recognized that, pursuant to their powers of self-government, Indian tribes have the power to regulate wildlife management activities and enforce fishing and hunting regulations in Indian country.

> Indian tribes have the right of self-government over their territory as well as their members. Protecting the resources within that territory involves regulation of nonmember hunting and fishing within reservations. Further, a tribe's authority to regulate nonmembers can be seen as derived from its powers to exclude nonmembers from the reservation and to establish conditions under which nonmembers may enter the reservation, and its authority under federal law

> to grant or deny permission to nonmembers to hunt, fish, or trap on Indian-owned lands. In the exercise of its regulatory authority, a tribe can require a nonmember to purchase a license and to abide by game management rules for the reservation's Indian lands. A tribe is free to set seasons, limits, gear limitations, impose fees and make other regulations, including a total prohibition effective against nonmembers so long as the regulations can be effected without subjecting non-Indians to tribal criminal jurisdiction.

F. Cohen, Handbook of Federal Indian Law, p. 465 (1982 Ed.) (footnotes omitted).

Further, this Court noted in Montana v. U.S., 450 U.S. 544 (1981) that non-Indians fishing or hunting on reservation land owned by non-Indians may be regulated where there is some threat to or direct effect "on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566. Accord, Eastern Band of Cherokee Indians, 588 F.2d at 79; cf. Bracker, 448 U.S. 136 (establishing the same principle within the context of the lumber industry). In

the instant case, just such a threat has been demonstrated.

V. WHITE MOUNTAIN APACHE TRIBE V. BRACKER REQUIRES A "PARTICULARIZED INQUIRY" INTO "THE NATURE OF STATE, FEDERAL, AND TRIBAL INTERESTS AT STAKE," AND SUCH AN INQUIRY FULLY SUPPORTS THE CONCLUSION OF THE TENTH CIRCUIT THAT THE STATE OF NEW MEXICO CANNOT LAWFULLY IMPOSE ITS FISH AND GAME REGULATIONS ON THE MESCALARO APACHE RESERVATION.

The Tenth Circuit made both the preemption and infringement analyses, applying principles explicated in White Mountain Apache Tribe v. Bracker. Mescalaro Apache Tribe, 630 F.2d 724. The Court applied a preemption analysis to pertinent treaties and federal legislation and closely examined the comprehensive tribal regulatory system and extensive federal developmental assistance and ultimately found federal preemption of the field. The court then looked to the tribe's right to self-government and found that the state had not asserted any interest sufficient to overcome the

tribe's interest in self-government.

A. THERE IS NO INCONSISTENCY BETWEEN THE DECISION OF THE TENTH CIRCUIT IN THE INSTANT CASE AND THE DECISION OF THIS COURT IN MONTANA V. UNITED STATES.

Montana held that the Crow tribe did not have the power to regulate non-Indians hunting and fishing on reservation lands owned in fee by nonmembers of the tribe. However, Montana is not applicable to the instant case. The first and most obvious distinction is that Montana dealt with regulation of non-Indian hunters on land owned in fee by non-Indians; however, the character of ownership of land is not solely determinative of the right to regulate in the area of wildlife management. Of greater significance is the level of federal involvement and the extent of tribal regulation.

The court below stated: "(T)he case before us deals with the broad power of

the tribe to control, exploit, and regulate tribal resources on tribal land." Mescalaro Apache Tribe v. New Mexico, 677 F.2d 55, 57 (10th Cir. 1982). The court likened the instant case to Merrion v. Jicarilla Apache Tribe, a finding consistent with the trend recognizing tribal regulatory authority in the area of resource management where the tribe's traditional interest in hunting and fishing rights is linked with a pervasive tribal regulatory scheme aimed at economic development. See Eastern Band of Cherokee Indians, 388 F.2d 75. See also Colville Confederated Tribes v. Walton, 647 F.2d 42, (9th Cir. 1981); Quechan Tribe of Indians, 424 F.Supp. 969.

B. THERE IS NO INCONSISTENCY BETWEEN THE DECISION OF THE TENTH CIRCUIT IN THE INSTANT CASE AND THE DECISIONS OF OTHER COURTS.

Recent decisions confirming state jurisdiction to regulate non-Indian

hunting and fishing in Indian country following application of the Bracker analysis, find insufficient evidence of federal preemption, the absence of tribal regulation coupled with an interest in tribal self-government or economic self-sufficiency, or both. See White Earth Band of Chippewa Indians, 518 F.Supp. 527, Quechan Tribe of Indians, 424 F.Supp. 969. Of course, an overriding state interest in conservation may be found where Indian hunting or fishing practices threaten the continuation of species, Washington Game Department v. Puyallup Tribe, 391 U.S. 392 (1968), but those facts are not presented in the instant case.

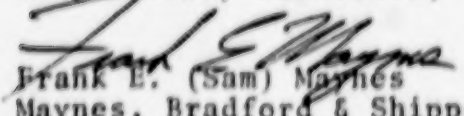
In Eastern Band of Cherokee Indians, the court found that strong federal policies of support for the Band's fishing program demonstrate an intent to preclude state regulation of non-Indians

fishing on the reservation. It was also found in that case that state regulation would impede the goals of tribal self-government and financial self-sufficiency. Id., 388 F.2d 75.

CONCLUSION

Under the analytical framework set forth in White Mountain Apache Tribe v. Bracker, examination of the state, federal and tribal interests at stake establish the right of the Mescalaro Apache Tribe to the exclusive control of wildlife within the boundaries of the Mescalaro Apache Reservation. That analysis defeats any attempt by the state to assert jurisdiction over non-Indians hunting and fishing within the exterior boundaries of the Mescalaro Apache Reservation; therefore, the Tenth Circuit should be affirmed.

Respectfully submitted,



Frank E. (Sam) Maynes
Maynes, Bradford & Shipps
Counsel for Southern Ute
Indian Tribe

P. O. Box 2717
Durango, CO 81301
(303) 247-1755